Supreme Court of the United States

OCTOBER TERM, 1960

No. 128

VERNON KIMBROUGH, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Eastern District of Kentucky		
Relevant docket entries	1	1
Indictment	2	2
Judgment and commitment	5	5
Motion to vacate sentence	6	7
Order re filing briefs	8	8
Memorandum in support of motion to vacate sentence	9	9
Memorandum opposing motion to vacate sentence	10	10
Order denying motion to vacate sentence	13	13
Affidavit and motion for leave to appeal in forma pauperis	14	14
Order granting leave to proceed in forma pauperis	16	15
Notice of appeal	17	16
Proceedings in the United States Court of Appeals for the Sixth Circuit	18	17
Judgment	18	17
Order granting leave to proceed in forma pauperis and petition for certiorari	19	18

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

RELEVANT DOCKET ENTRIES

ITEM	PLEADING	DATE FILED
1	Indictment	4-28-41
2	Judgment and Commitment	4-28-41
3	Motion to Vacate Sentence	4-9-59
4	Order Placing Counsel on Time for Filing Briefs	4-13-59
5	Memorandum of Defendant	4-28-59
6	Memorandum of U. S. Opposing Motion to Vacate	5-4-59
7	Order Denying Motion to Vacate	6-2-59
8	Affidavit and Motion for Leave to Appeal in Forma Pauperis	6-16-59
9	Order Permitting Defendant to File Notice of Appeal in Forma Pauperis	6-16-59
10	Notice of Appeals	7-13-59
11	Designation of Record on Appeal	7-13-59

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[fol. 2] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

April Term, 1941,
At Richmond

INDICTMENT—Filed April 28, 1941

The Grand Jurors of the United States of America, duly impaneled, sworn, and charged to inquire within and for the Eastern District of Kentucky, upon their oaths do find and present;—

That, heretofore, to-wit, on and about the 19th day of January, 1941, and between said date and the 13th day of February, 1941, before the finding of this indictment in said Eastern District of Kentucky, and within the jurisdiction of this Court, Edwin Wade Sharpe, William Edward Sanders and Vernon Kimbrough, hereinafter called defendants, did unlawfully and feloniously conspire to commit offenses against the United States, that is, to transport and cause to be transported in interstate commerce from Florida, Georgia, and other foreign States, to the State of Kentucky, motor vehicles which had theretofore been stolen, knowing the same to have been so stolen, and to receive, conceal and store said motor vehicles so stolen and so transported, which were moving as, were a part of and did constitute interstate commerce, knowing the same to have been so stolen;

And that while said conspiracy existed and to effect the object thereof, said defendants committed the following overt acts, to-wit:

That, on or about the 12th day of February, 1941, they, the said defendants unlawfully and feloniously transported in interstate commerce from Atlanta, in the State of Georgia, to Owen County, near Frankfort, Kentucky, in the Eastern District of Kentucky, one 1941 grey Super DeLuxe Ford two-door sedan automobile, Motor No. 18-5929623, which the said defendants had theretofore stolen or caused to be stolen from the Roundtree Motor Company, A. Jack Roundtree, owner, Lake City, Florida, they, the said defendants then and there well knowing that said motor vehicle had been so stolen.

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[fol. 3] That on or about the 19th day of January, 1941, and between said date and the 13th day of February, 1941, they, the said defendants unlawfully and feloniously did receive, conceal and store the aforesaid automobile, while the same was moving as, was a part of and did constitute interstate commerce, from Lake City, in the State of Florida, to Owen County, in the State of Kentucky, they then and there well knowing that same had been stolen from the Roundtree Motor Company, A. Jack Roundtree, owner, Lake City, Florida, and transported in interstate commerce to Owen County, in the State of Kentucky, as aforesaid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present;—

That, heretofore, to-wit, on and about the 12th day of February, 1941, before the finding of this indictment in said Eastern District of Kentucky, and within the jurisdiction of this Court, they, the said Edwin Wade Sharpe, William Edward Sanders and Vernon Kimbrough, did unlawfully and feloniously transport and cause to be transported in interstate commerce, from Atlanta, in the State of Georgia, to Owen County, Kentucky, in the Eastern District of Kentucky, near Frankfort, Kentucky, one 1941 Super DeLuxe Ford two-door sedan automobile, Motor No. 18-5929623, which had been theretofore stolen from the Roundtree Motor Company, A. Jack Roundtree, owner, Lake City, Florida, they, the said defendants, and each of them, then and there well knowing that said automobile had been stolen as aforesaid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present;—

[fol. 4] That, heretofore, to-wit, on and about the 19th day of January, 1941, and between said date and the 13th day of February, 1941, before the finding of this indictment in said Eastern District of Kentucky, and within the jurisdiction of this Court, they, the said Edwin Wade Sharpe, William Edward Sanders and Vernon Kimbrough, did unlawfully and feloniously receive, conceal, and store one 1941 grey Super DeLuxe Ford two-door automobile, Motor No. 18-5929623, which had theretofore been stolen from the Roundtree Motor Company, A. Jack Roundtree, owner, at Lake City, Florida, on January 19, 1941, was then and there moving as, was a part of, and constituted interstate commerce, from Lake City, in the State of Florida, to Owen County, near Frankfort, Kentucky, in the Eastern District of Kentucky, they and each of them then and there well knowing that said automobile had been so stolen.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

/s/ John T. Metcalf
United States Attorney

18-88;
18-408.

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[fol. 5] (File Endorsement Omitted)

DISTRICT COURT OF THE UNITED STATES
Eastern District, Kentucky-Richmond Division

No. 4768 Criminal [1] indictment in three counts for violation of U. S. C., Title 18, Secs. 88 and 408

UNITED STATES OF AMERICA

v.

VERNON KIMBROUGH

JUDGMENT AND COMMITMENT—April 28, 1941

On this 28th day of April, 1941, came the United States Attorney, and the defendant Vernon Kimbrough appearing in proper person, and by counsel, James E. Keyser, a regular practicing attorney of this [2] Court and,

The defendant having been convicted on [3] his plea of guilty of the offense charged in the [1] indictment in the above-entitled cause, to wit [4] unlawfully conspiring to transport and conceal automobiles in interstate commerce, and transporting and concealing same and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, IT IS BY THE COURT

ORDERED AND ADJUDGED that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the penitentiary or reformatory type to be designated by the Attorney General or his authorized representative for the period of [6]

Count No. 1 Two (2) Years
Count No. 2 Five (5) Years
Count No. 3 Five (5) Years

said sentences to be served consecutively, the sentence on the first count to be served first and that said defendant be imprisoned until said defendant is otherwise discharged as provided by law.[7]

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United [8] States Marshal or other qualified officer and that the same shall serve as the commitment herein.[9]

(Signed) H. Church Ford
H. CHURCH FORD
United States District Judge

A True Copy. Certified this 28th day of April, A. D. 1941

(Signed) (By)

A. B. Rouse, Clerk Deputy Clerk

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[1] Indictment or information. [2] Insert (*a*) "by counsel" or (*b*) "having been advised of his constitutional right to counsel and having been asked whether he desired counsel assigned by the Court, replied that he did not," whichever is applicable. [3] Insert the words "his plea of guilty," "plea of nolo contendere," or "verdict of guilty," as the case may be. [4] Name specific offense or offenses and specify counts upon which convicted. [5] Insert type of institution such as "jail," "training school," "reformatory," "penitentiary," or "special." If prisoner's circumstances require special type institution, Marshal should subject facts and recommendations of Court to Attorney General where regulations do not apply. [6] Insert sentence and any provision the payment of fine and state whether sentences are to run concurrently or consecutively and, if consecutively, when such term is to begin; that is, with reference to termination of preceding term, or with respect to any other outstanding or unserved sentence. [7] Strike out if Court did not so order. [8] Indicate any order with respect to suspension and probation. [9] Certified copy to accompany defendant to institution.

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[fol. 6] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Case No. 4768
(Title 18, Section 2255, U.S.C.)

VERNON P. KIMBROUGH, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

MOTION TO VACATE SENTENCE—Filed April 9, 1959

Comes now Vernon P. Kimbrough, and respectfully moves this Court to vacate the sentence of five (5) years imposed on April 28, 1941 on Count III of the above-entitled case charging violation of 18 USCA, Section 408* (receiving and concealing a stolen motor vehicle constituting interstate commerce).

This motion is grounded on the allegations that the conviction was obtained in violation of laws and constitution of the United States, and, more specifically, that:

1. The offense of receiving and concealing merged into the consumated offense of transportation of the same motor vehicle as charged in Count II of the indictment.
2. Congress did not intend in enacting Section 408 that the transporter be also punished for receiving and concealing the same stolen motor vehicle.
3. Conviction and sentence for transporting in interstate commerce a stolen motor vehicle is a bar to punishment of the same person for receiving and concealing the same motor vehicle.

* Now section 2313 of Title 18, U.S.C.A.

[fol. 7] 4. Count III of the instant indictment does not charge an offense cognizable under the United States Penal Code.

The petitioner should have had a final release from the sentence imposed under Case. No. 4768 on or about October 1, 1952 and therefore is eligible for release forthwith.

/s/ Vernon P. Kimbrough
VERNON P. KIMBROUGH, Petitioner
P.M.B. No. 1273,
United States Penitentiary
Alcatraz Island, California

[fol. 8] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
RICHMOND

(Title Omitted)

ORDER RE FILING BRIEFS—April 13, 1959

The defendant having filed herein on April 9, 1959 his Motion to Vacate Sentence it is ORDERED that within twenty days from this date the defendant file and serve Memorandum in support of his Motion and within twenty days thereafter the plaintiff serve and file Brief in opposition, and pursuant to Rule 78 the submission and determination of the Motion shall be upon such Briefs without oral argument unless otherwise ordered by the Court.

H. CHURCH FORD
Judge

April 13, 1959

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[fol. 9] (File Endorsement Omitted)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
RICHMOND

(Title Omitted)

MEMORANDUM IN SUPPORT OF MOTION TO VACATE SENTENCE—Filed April 26, 1959

The petitioner has now filed in this Court an action entitled "Motion to Vacate Sentence". This memorandum is made in support thereof.

In his original pleading, the petitioner urges that the sentence of five (5) years imposed on Count III be vacated on the ground that the acts charged in Count III merged into the acts charged in Count II and upon which an additional sentence of five (5) years was imposed.

The petitioner contends that the "same transaction" test should be applied to the instant case. Bell v. United States, 349 U.S. 81; United States v. Universal C.I.T. Credit Corporation, 344 U.S. 218; Prince v. United States, 352 U.S. 322; Heflin v. United States, 79 S. Ct. 451.

CONCLUSION

It is respectfully submitted that for the reasons aforesaid the motion should be sustained.

/s/ Vernon P. Kimbrough
VERNON P. KIMBROUGH
Petitioner
Box 1273
United States Penitentiary
Alcatraz, California

Dated: April 23, 1959
cc: U. S. Attorney

[fol. 10] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT RICHMOND

(Title Omitted)

MEMORANDUM OPPOSING MOTION TO VACATE SENTENCE—
Filed April 28, 1959

The defendant, in 1941, pleaded guilty to three counts of an indictment which charged, in effect, as follows:

(1) That defendant did conspire to commit a crime against the United States, to wit: to transport a motor vehicle in interstate commerce knowing same to have been stolen (2) Defendant moved in interstate commerce a motor vehicle knowing same to have been stolen and (3) receiving and concealing a motor vehicle knowing same to have been stolen. All three counts dealt with the same motor vehicle. The defendant was sentenced to 2, 5 and 5 years respectively on the counts, the sentences to run consecutively. Defendant now moves the Court to vacate sentence on Count 3 and alleges as grounds that the offense of receiving and concealing merged into the offense of transportation of same motor vehicle; Congress did not intend in enacting Section 408 (Now Title 18, Section 2313, USCA) that the transporter be also punished for receiving and concealing the same motor vehicle; sentence for transporting in interstate commerce is a bar to punishment of same person for receiving and concealing the same motor vehicle and that Count III does not charge an offense cognizable under the United States Penal Code.

[fol. 11] ARGUMENT

The defendant's contention and motion seems to be based solely on the "same transaction" test and he cites as authorities *Bell* v. *United States*, 349 US 81; *U. S.* v. *Universal C.I.T. Corp.*, 344 U.S. 218; *Prince* v. *U. S.* 352 U.S. 322; and *Heflin* v. *U. S.*, 79 S. Ct. 451. All the cases relied upon by the defendant state in effect that "double

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punishment" is administered when one is convicted under 2 or more counts involving the "same transaction," such as "entering or attempting to enter any bank with intent to commit in such bank—any felony or larceny and robbery of the same bank. Clearly, the entering of a bank with intent to commit in such bank any felony and bank robbery are parts of only one transaction or the "same transaction" and one should not be punished except for the one transaction. However, the cases cited by the defendant do not have any bearing on the case at bar since the three counts contained in the indictment against the defendant are all separate and distinct offenses and arise not out of the "same transaction," but three separate transactions (See *Record* v. *Hudspeth,* 126 F.2d 215, 216).

The plea, autrefois acquit, to be availed of, must demonstrate that the offenses referred to are precisely the same in law and in fact, or, as said by Mr. Justice Harlan in *Burton* v. *United States,* 202 U.S. 344, in adopting the language of C. J. Shaw: "The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact." Although there are not two indictments in the case at bar, the defendant complains that receiving and concealing is a part of the transporting. There is no merit in that argument since there are no common law crimes cognizable in the Federal Courts and the receiving and concealing section referred to is purely a creature of statute. It is not a combination of offenses, but is a distinct and separate offense in law.

[fol. 12] The test that should be used in deciding the question presented is, "whether acquittal or conviction on a similar count or charge bars conviction on another charge where the same evidence would be required to establish the commission of both crimes." (37 F.2d 846; 143 F.2d 544 and 149 F.2d 481). The evidence necessary to prove transporting is not sufficient to prove receiving and concealing.

The question at bar is not new to this Court. In *U. S.* v. *Runion,* 47 F. Supp. 594, *U. S.* v. *Dye,* 61 F. Supp. 457, and in *U. S.* v. *Spradley,* 65 F. Supp. 136, affirmed 162

F. 2d 203, the Court was faced with the same question and those cases firmly established the rule of law that double punishment is not imposed by sentencing a defendant on counts of transporting and receiving and concealing, even though the sentences on both are to run consecutively.

Conclusion

There are two separate and distinct offenses stated in the statute: First, the offense of transporting in interstate commerce a motor vehicle knowing the same to have been stolen, and second, receiving, concealing, storing, bartering, selling or disposing of a motor vehicle moving in interstate commerce knowing the same to have been stolen. Since there are two separate offenses and because the same evidence would not sustain the punishment under both counts, the "same transaction" test is not applicable. The motion to vacate sentence under Count 3 should be overruled.

Henry J. Cook
United States Attorney

By:
R. Caywood Metcalf
Assistant U. S. Attorney

This is to certify that service of the within brief was had this 4 day of May, 1959, by mailing a true copy to Vernon P. Kimbrough, Box 1273, U. S. Penitentiary, Alcatraz, California.

R. Caywood Metcalf
Assistant U. S. Attorney

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[fol. 13] (File Endorsement Omitted)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

(Title Omitted)

ORDER DENYING MOTION TO VACATE SENTENCE—
June 2, 1959

This cause coming on to be heard upon the Defendant's Motion to Vacate the Sentence imposed on Count Three of the indictment and the Court having considered the briefs filed on behalf of the respective parties and being advised, it is ORDERED and ADJUDGED that the motion to vacate the sentence imposed under Count Three of the above entitled case should be and is denied.

/s/ H. Church Ford
H. CHURCH FORD, Judge

June 2, 1959

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[fol. 14] (File Endorsement Omitted)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

(Title Omitted)

AFFIDAVIT AND MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS—Filed June 16, 1959

State of California)
County of San Francisco) ss.

Vernon Kimbrough, having been duly sworn according to law, deposes and says that he is a citizen of the United States by birth, of legal age, and a pauper person within the meaning of Section 1915(a) of Title 28, United States Code.

That the petitioner respectfully asks leave of the Court for permission to appeal in forma pauperis from the order of this Court dated June 2, 1959, denying motion to vacate the sentence on Count Three of the above entitled indictment.

In support hereof, the petitioner says further:

[fol. 15] 1. That he verily believes he has a just cause for action.

2. That he takes the appeal in good faith and his position is not frivolous.

/s/ Vernon Kimbrough
VERNON KIMBROUGH
Affiant

Sworn and subscribed before me this 10th day of June, 1959.

/s/ O. W. Blackwell
Associate Warden
U. S. Penitentiary
Alcatraz, California

Associate Warden Authorized by Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

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[fol. 16] (File Endorsement Omitted)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
RICHMOND

(Title Omitted)

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS—
June 16, 1959

The Clerk having reecived "Affidavit and Motion for Leave to Appeal in Forma Pauperis" from the defendant, Vernon Kimbrough, and the Court having considered same

It is ORDERED that the Motion be and is sustained and the defendant is permitted to file Notice of Appeal in forma pauperis.

/s/ H. Church Ford
Judge

June 16, 1959

• • • •

[fol. 17] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

• • • •

NOTICE OF APPEAL—Filed July 13, 1959

Name and address of appellant: Vernon Kimbrough, Box 1273, Alcatraz, California

Concise statement of Judgment: Denial of Motion to Vacate Sentence (28 U.S.C.A. 2255)

Order appealed from: Denial of Motion to Vacate Sentence

Date of Order: June 2, 1959

Name of Judge: H. Church Ford

Notice is hereby given of appeal from the aforesaid order to the United States Court of Appeals for the Sixth Circuit, Cincinnati, Ohio.

/s/ Vernon Kimbrough
VERNON KIMBROUGH, Appellant

• • • •

[fol. 18] IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

• • • •

VERNON KIMBROUGH, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

ORDER

BEFORE: McAllister, Chief Judge, Miller, Circuit Judge, and Brooks, District Judge.

JUDGMENT—December 28, 1959

The above cause coming on to be heard on the appeal of Vernon Kimbrough from an order of the District Court denying appellant's motion to vacate sentence under Title 28, U.S.C.A. 2255, and the court being duly advised:

Now, therefore it is ordered, adjudged and decreed that the order of the District Court be, and is hereby affirmed. Blockbarger v. United States, 234 U.S. 299; Gore v. United States, 357 U.S. 386; Woody v. United States, 258 F.2nd 535 (C.A. 6).

Approved for entry:

/s/ Signature Illegible
United States Circuit Judge

[fol. 19] SUPREME COURT OF THE UNITED STATES

• • • •

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR CERTIORARI—June 6, 1960

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 987 and placed on the summary calendar.

June 6, 1960

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